IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

---

**No. 118**

---

CHARLES RALPH JOHNSTON,

*Petitioner,*

*vs.*

DAVID McINTEE, ETC., ET AL.,

*Respondents.*

---

## RESPONDENTS' OPPOSING BRIEF.

---

## STATEMENT OF THE CASE.

---

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The facts are adequately stated in the opinion of the court below. However we restate some of the facts for the purpose of adding the record citations.

Reka Goldberg Hofheimer (hereinafter called plaintiff) filed her complaint November 29, 1941 (Tr. 2) nearly nine years ago, alleging an oral trust created in November, 1914 whereby Sol H. Goldberg agreed to hold certain stock of Hump Hair Pin Manufacturing Company in trust for her. The amended and supplemental complaint, filed December 10, 1942, alleges plaintiff "is lawfully and beneficially en-

titled'' to this stock (Tr. 5). On an appeal from an order denying a temporary injunction, the Circuit Court of Appeals, 7th Circuit, in *Hofheimer* v. *McIntee*, 40 F. (2d) 363, affirmed on December 15, 1943 and the opinion (J. Minton) says, p. 366: ''The denial of a motion for a temporary injunction, based upon a verified complaint alone, was certainly no abuse of discretion, *where the complaint did not state a cause of action* or any facts showing irreparable injury'' (Emphasis ours).

On September 24, 1941, two months before the suit was begun, plaintiff entered into an agreement with Harold M. Keele whereby she retained him to prosecute her claims and file this suit (Tr. 19). She agreed to pay Keele a contingent fee equal to one-third of the recovery (Tr. 21). ''To insure payment of said contingent fee'' she assigned one-third of the stock ''owned at law or in equity'' by plaintiff (Tr. 21), and one-third of the recovery. Keele agreed ''to bring and prosecute all legal and other proceedings in the name of the client'' (Tr. 20); to execute pleadings, affidavits and other documents ''in the name of the client'' (Tr. 20); to collect every judgment ''rendered in favor of the client'' (Tr. 22), and to prosecute any appeal ''rendered against the client'' (Tr. 22). If the attorney failed to collect, he was to reassign the stock to client (Tr. 22). This agreement was assigned by Keele to Johnston, petitioner, on September 25, 1942 (Tr. 23).

## QUESTIONS PRESENTED.

Not one of the three questions presented in the Petition for Certiorari, p. 5, forms the basis for the decision of the Court below, except possibly point II. The Court below held that since more than two years elapsed after the death of the sole plaintiff, the case must be dismissed under Rule 25(a)(1) in accordance with the decision of this Court in *Anderson* v. *Yungkau,* 329 U. S. 482, and accordingly petitioner could not be substituted as a party plaintiff.

## ARGUMENT.

Since this case had to be and was dismissed pursuant to Rule 25(a)(1), it is unnecessary to enter into a theoretical argument concerning the interpretation of Rule 25(c) on the basis of the questions framed by the petitioner. Nevertheless we shall meet the questions as presented by the petitioner.

### I.

**Whether a Transferee Pendente Lite, But Whose Assignor Became a Transferee Prior to the Filing of an Action In Rem, May Be Substituted Under Rule 25 (c).**

On proposed Question I, petitioner says that the opinion of the Court of Appeals is in conflict with *Dryden* v. *Land Investment Co., Inc.*, 127 F. (2d) 586. There is no conflict. In the *Dryden* case Dryden and Todd joined in a petition to annul a tax title acquired in 1933. It was filed January 5, 1939. It alleged that Dryden had conveyed the property to Todd October 24, 1938. This deed was not recorded until February 14, 1939. The defendant contended that Dryden could not recover because he alleged title out of himself, and Todd could not recover because he did not have title at the time of the filing of the suit. This was based on a provision of the Louisiana Code that a deed is wholly ineffective as to third persons until recorded. The court held title must have been in either Dryden or Todd, and since both joined in the petition relief could be granted. Then the court said this about Rule 25(c):

> "If the recording of the deed after the suit was filed be viewed as transferring the right at that date, Rule 25(c) provides for an amendment joining or substituting the transferee."

That is to say, that since the transfer of the interest took place at the recording of the deed on February 14, 1939, which was subsequent to the filing of the petition on January 5, 1939, it was a transfer *pendente lite,* and therefore a transfer within the meaning of Rule 25(c). The opinion of the Court in this case is not in conflict with that holding.

## II.

**Whether a Transferee May Be Substituted Under Rule 25(c) At Any Time Prior to the Actual Dismissal of the Proceeding in the District Court, Even Though Such Action Is Dismissable (But Has Not Actually Been Dismissed) Under Rule 25(a) (1).**

In the case of *Anderson* v. *Yungkau,* 329 U. S. 482, this Court held that Rule 25(a) operates both as a statute of limitations upon revivor and as a mandate to the Court to dismiss an action not revived within the two year period. Pursuant to this rule defendants moved to dismiss the case and a month later petitioner moved, among other things, to be substituted as the sole plaintiff in the case. Petitioner's argument is to the effect that he may be substituted as the plaintiff under Rule 25(c) even though the case must be dismissed under Rule 25(a)(1) because of the death of the sole plaintiff. Petitioner says, Petition 6, that it is impossible to reconcile the Court's ruling with *Hood* v. *Bell,* 84 F. 2d 136. There is no conflict between the *Hood* case and the Court's opinion. The *Hood* case was decided before the adoption of the Federal Rules of Civil Procedure and did not involve a deceased party. The Court applied the law of North Carolina in accordance with the Conformity Act which was in effect prior to the adoption of the Rules of Civil Procedure. The *Hood* case accordingly did not involve an interpretation of Rule 25(c) of the Federal Rules of Civil Procedure nor as previously stated did

it involve a deceased party nor a mandatory dismissal for failure to substitute.

Rule 25(c) contemplates that the original party be living. Otherwise, the suit could not be continued by or against the original party, nor could the transferee be joined with the original party, as Rule 25(c) provides. The words "original party" as used in this rule necessarily refer to a living party. If a party dies, he becomes a "deceased party," which is the term used in Rule 25(a). The term "deceased party" nowhere appears in Rule 25(c). Only Rule 25(a) provides for substitution of a deceased party. If Rule 25(c) could be said to apply to a deceased party, then it would follow that the rule authorizes an action to be continued by or against a deceased party, for under the rule it is not necessary to substitute or join the transferee. Such an interpretation of the rule is patently unsound.

## III.

**Whether a Transferee by an Absolute Assignment of a Part of the Res Sued for by the Original Plaintiff in an Action In Rem May Be Substituted Under Rule 25(c), Even Though Such Transferee Does Not Claim to Be the Assignee of the Entire Res Involved.**

The Court did not hold, as petitioner claims, that petitioner had no right to intervene because "he is not the owner of the entire *res* involved." The petitioner sought to adopt Hofheimer's complaint in its entirety to recover the entire *res*, whereas petitioner himself claims no more than one-third thereof. The Court merely held that since he is not the holder of the entire *res*, he could not be substituted as sole plaintiff, but would be limited to intervene as a co-plaintiff except that his failure to intervene within the period of two years after the death of the sole plaintiff made it necessary to dismiss the case.

None of the cases cited by petitioner under his point III is in conflict with the decision of the Court below. It is apparent from petitioner's own analysis of the case that none of them holds that an assignee of part of a *res* may sue to recover the entire *res* or that such an assignee may be substituted for a deceased sole plaintiff who claimed ownership of the entire *res*.

We state again, however, that whether the petitioner was entitled to sue for the entire *res* or only part of the *res* he could not be substituted for the plaintiff because of failure to revive the suit under Rule 25(a)(1) and of the requirement that the suit be dismissed under that rule.

Respectfully submitted,

CLAUDE A. ROTH,
HARRY E. SMOOT,
GOTTLIEB, SCHWARTZ & FRIEDMAN,
*Attorneys for The Hump Hair Pin Manufacturing Company, a corporation, and Chain Store Products Corporation, a corporation,*

LOUIS M. MANTYNBAND,
GEORGE L. SIEGEL,
ARVEY, HODES & MANTYNBAND,
*Attorneys for David McIntee, Theodor Lange, Irving Richard Green and Ruth K. Goldberg, individually and in the capacities sued.*